

that he met with personal injury by accident that arose out of and in the course of his employment with respondent. See K.S.A. 44-534a(a)(2).

Both of the attorneys involved in this appeal announced during oral argument that they would not be filing briefs supporting their respective positions in this case. In every case that comes before the Appeals Board, the entire record that has been established before the Administrative Law Judge is reviewed. However, briefs from the parties are also requested and expected in order for the Appeals Board to have legal authorities on questions of law and specific references to the record that support their respective positions on each issue raised. Even though this is only a preliminary hearing order, since neither of the parties felt compelled to support their argument with a brief, many hours were expended reviewing testimony and portions of the voluminous record that were relevant to the issue now before us.

In this case, claimant makes a claim for an occupational disease that he alleges arose out of and in the course of his employment with the respondent, resulting from the nature of his employment. He claims a date of accident of April 23, 1993, the last date he worked for the respondent.

An occupational disease is defined in K.S.A. 44-5a01(b) as:

"[A] disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. *'Nature of the employment' shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases*" (Emphasis added.)

The Administrative Law Judge found, for purposes of preliminary hearing, that the claimant suffered from an occupational disease and granted claimant's request for benefits. The Administrative Law Judge relied upon testimony and medical records of the claimant's treating physician, Robert Sourk, M.D., in determining that the claimant had met his burden of proving an occupational disease.

Claimant had been employed by the respondent since 1991. On April 23, 1993, the claimant's last day worked, he was employed as a Bulk A Loader. Claimant's job was to load, utilizing a Caterpillar loader, bulk salt into rail cars and trucks for shipment. He first experienced lung and breathing problems in 1992. He sought treatment at the Hutchinson Hospital Emergency Room in February 1992. Claimant testified that the salt dust blew in his face at times when he was working and was so dense that he could not see two to three (2-3) feet in front of him.

After claimant's emergency room visit he saw Dr. Sourk, who prescribed medication for what the doctor concluded as obstructive lung disease from exposure to dust at the claimant's work. The claimant's second visit to Dr. Sourk was not until April 7, 1993, when Dr. Sourk then advised the claimant to leave his employment because of the dust exposure. The claimant took Dr. Sourk's advice and terminated his employment with the respondent on April 23, 1993.

The claimant took Dr. Robert Sourk's deposition on July 21, 1994. At that time, Dr. Sourk had last seen claimant on July 6, 1994. Dr. Sourk is a board-certified internist, specializing in pulmonary medicine, but is not board certified in that specialty. Dr. Sourk diagnosed claimant of having obstructive lung disease, secondary to bronchiolitis obliterans. Bronchiolitis obliterans is an inflammation disorder of the small airways in the lungs causing obstructive lung disease. Dr. Sourk opined that claimant's obstructive lung disease was a result of his many years of exposure to dust while working for respondent. It was Dr. Sourk's opinion that as of July 6, 1994, claimant was temporarily totally disabled and was in need of continuing medical care.

Respondent had David Duffy, a board-certified industrial hygienist, testify as to the type and level of chemical exposure that the claimant experienced while working. Mr. Duffy opined that the chemicals found in the dust at the respondent's plant were generally classified as nuisance particles that do not interact with the terminal structure of a person's lungs. Mr. Duffy found from his testing that the exposure level of such chemicals, even if doubled, present at the respondent's plant would be less than the permissible exposure level. Mr. Duffy tested the loading area of the plant where the claimant worked which is the dirtiest area of the plant.

Respondent argues that based on the testing done by Mr. Duffy the chemical levels contained in the dust at the claimant's plant could not have caused the claimant's current obstructive lung disease. On the other hand, claimant relies on Dr. Sourk's medical opinion that the claimant's exposure to the dust while working for the respondent is the cause of claimant's current lung condition.

The Appeals Board, for preliminary hearing proposes, finds and concludes that the Administrative Law Judge's decision in this matter, granting benefits to the claimant, should be affirmed. Medical testimony of claimant's physician, Dr. Sourk, connecting claimant's dust exposure while working for the respondent with his current lung condition, is given more weight than respondent's industrial hygienist's opinion.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge George R. Robertson, dated August 8, 1994, should be, and the same is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of June 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert A. Anderson, Ellinwood, KS
Douglas C. Hobbs, Wichita, KS
George R. Robertson, Administrative Law Judge
George Gomez, Director